In the Supreme Court
OF THE
United States

OCTOBER TERM, 1924

No.

PACIFIC AMERICAN FISHERIES,
Petitioner.

vs.

TERRITORY OF ALASKA,
Respondent.

Brief for Respondent
On Petition for Certiorari.

STATEMENT OF CASE

Three questions present themselves in this case, viz:

1. Does the inhibition upon the local legislature to "amend, modify or repeal" the laws of Congress regulating the manner of catching fish in the waters of Alaska deprive the legislature of all police power over the industries dependent upon fishing, such as the manufacture of fish products?

2. If the legislature possess no police power over the manufacture of fish products, may it, nevertheless, under its general power to levy excise taxes, levy upon the canning of salmon an excise which has a tendency to regulate the industry?

3. In levying an excise may the legislature grade the rate of the tax so as to be proportionately heavier upon the larger outputs, if thereby the burden of the tax becomes more equalized in proportion to the ability to carry it?

ARGUMENT

I

The first question was decided by this court in Alaska Fish Salting and By-products Co. vs. Smith, 255 U. S. 44. That case involved an excise levied upon oil and fertilizers manufactured from herring, while no such tax was levied upon oil or fertilizer manufactured from offal of fish. The tax was admittedly regulatory in its purpose. Plaintiff complained it was destructive of the industry. This court held that the Territory had a right to use its taxing power to put a stop to the manufacture of manure from food fish, notwithstanding the lack of power to enact "fish laws." "This," said the court, "is not a fish law, as we understand it", it is a tax.

The only laws at the present time looking toward the sanitary conditions of the great canning industry of Alaska are those enacted by the local legisla-

ture on the theory that it had police authority over the industry ashore, and consisting not of fishing, but of making food out of fish.

If the Territory has no regulatory authority over these industries, all sanitary regulations become null and void.

Again, in the case of Haavik vs. Alaska Packers Assn., 263 U. S. 510, this court held that the legislature had power to levy an excise tax of five dollars on all non-resident fishermen, though no such tax was levied upon resident fishermen. The fact that the tax was discriminatory did not invalidate it, because the only uniformity required by the constitution is geographical uniformity.

II

The Court of Appeals held, in this case, that the inhibition against regulating the manner of catching the fish was in itself an inhibition against the regulation of the manufacture of the products from fish. Following out that theory, the court stated, in substance, that it could not be presumed that an unlimited power to tax was granted where there was no power to regulate.

This expression seems rather inadvertent than deliberate.

Congress has no police authority over industries and yet may, by the excise, tax industries to death. This it has done several times; and may also by the

same taxing power and discrimination, bring industries into being. This, too, it has often done.

While the police, or regulatory, power has been retained by the states, the Congress may nevertheless, by the excise, destroy the industries in the various states.

Veazie Bank vs. Fenno, 8 Wall. 533.

Where the legislature has the taxing power, and employs it, the court will not inquire whether it has been employed wisely, or justly,—or even honestly. The only question, in such case, asked by the court is whether or not the legislature had jurisdiction.

That the law here in question is a tax will not be doubted. If it is, the legislature had jurisdiction, and there the inquiry of the court stops.

On this point the case of McCray vs. United States, 195 U. S. 27, is typical. This court there considered a law which imposed a tax forty times as high on yellow as on white oleomargarine. Obviously the tax was designed to drive oleomargarine out of the market as a competitor with butter. This court held the purpose of the law was beyond its function to consider. The law was enacted in pursuance of the taxing power, and whether that power has been used to destroy the industry, even though the legislature had no police power, was a question beyond the jurisdiction of the court to consider.

In the Veazie Bank case this court sustained a law

obviously designed to, and which did, drive notes of State Banks out of circulation. Congress had no regulatory power, but it had unlimited taxing power.

When Congress gave the local legislature power to tax business it thereby gave the power to destroy business, and the court will not inquire whether the power was abused or not.

That the Territory has the taxing power is not doubted.

Alaska Pac. Fisheries vs. Territory, 236 Fed. 52;
Alaska Salmon Co. vs. Territory, 236 Fed. 62;
Northern Com. Co. vs. Territory, 289 Fed. 786;
Alaska Fish Co. vs. Smith, 255 U. S. 44;
Haavik vs. Alaska Packers Assn.,263 U.S. 510;

The objection is made that classification of subjects for the purpose of taxation cannot lawfully be based upon amount of business transacted. But "classification by amounts" has been uniformly approved of by this court.

The income tax and inheritance tax laws both classify the subjects by amounts and are graduated upwards. The larger the income and the inheritance, the proportionately larger the tax.

In Clark vs. Titusville this court considered an ordinance which graduated the license tax upon commercial business so that proportionately the heavier tax was paid by the smaller establishments.

This court held it good, and said that exactly the same rule of law applied to a graduated tax upon any industry as applied to income or inheritance. "Classification by amount", said the court, could lawfully be applied to anything the same as to inheritance. The classification by amount means different rates upon the different classes established on basis of difference in the amount. That case should settle this question.

Whether the tax is graded upwards or downwards depends upon the location of the starting point. If this law fixed the tax at 30c per case on the pack over 40,000 cases, 25c per case on the pack between 30,000 and 40,000 cases, 20c per case on the pack between 20,000 cases and 30,000 cases, etc., it would be grading downward. The mere fact that it started at the other end of the ladder does not affect the right to use the ladder.

III

The reasonableness or unreasonableness of a discrimination is not a question for the court, but in view of what has been stated by the court below relative to my admissions as to the discriminatory character to the tax, I quote the following from pages 9 and 10 of my brief before the Court of Appeals:

> "The theory on which the court is asked to hold, as a matter of law, that a tax graded "upwards" is void though one graded downward is valid, is set out on pages 37 and 38 of counsel's brief and is worth quoting:

"'The court will know judicially that in the business of managing a salmon cannery in Alaska there is an irreducible minimum of expense which must be borne, regardless of the size of the pack. * * * * The larger the pack at any cannery the proportionately less charge for this overhead enters into the cost of the canned product. * * * * Through such taxation the large factory may be compelled to pay proportionately more for its output than the small factory, and the employer of a large number of men may be compelled to pay more per employee than the small employer, and all the economy which has resulted from the concentration in a single plant of large and efficient equipment and machinery would be swept away.'

"This is all true. But is not the wisdom of such legislation a matter for the lawmakers rather than for the court to decide?

"Undoubtedly, an ungraduated tax would fall proportionately heavier on the small than on the big operator."

It is notorious that the run of fish varies each year on the various parts of the coast. Some canners may secure salmon enough for all they are equipped to handle, some may secure only "half pack," and some only a third, or less, of what they prepared for. One who gets "full pack" makes heavy profits; one who secures a small pack will probably lose money. To require the same case tax from all would place an unequal burden on the operators. The graduation of the tax is in a measure to equalize the burden. The apparent discrimination against the large pack

is therefore justified as the more equitable,—if that question is to be considered by the court as within the province of the judiciary.

The limitations upon the power of the states embodied in the fourteenth amendment to the constitution do not apply to the Territory of Alaska.

Alaska vs. Troy, 258, U. S. 101;

Haavik vs. Alaska Packers Assn.,263 U.S.510.

Respectfully submitted,

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Attorney General of Alaska,

Attorney for Respondent.

Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 844 246

PACIFIC AMERICAN FISHERIES, PETITIONER,

vs.

TERRITORY OF ALASKA, RESPONDENT.

BRIEF FOR RESPONDENT.

JOHN RUSTGARD,
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PACIFIC AMERICAN FISHERIES, PETITIONER,

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TERRITORY OF ALASKA, RESPONDENT.

BRIEF FOR RESPONDENT.

Statement of Case.

As near as can be determined from petitioner's brief, the major premises underlying petitioner's several contentions may be briefly stated as follows:

1. That the Territory of Alaska has no police power over the fisheries, nor other authority to regulate the same.

2. That inhibition against regulating fishing necessarily carries with it by implication an inhibition against regulating the manufacture of fish products.

3. That the power to levy an excise tax, unaccompanied by a police power, cannot be so laid as to regulate an industry.

4. That, for the purpose of taxation, "classification by amount" is unconstitutional in event the tax is "graded upwards."

5. That the revenue resulting from the tax in dispute is grossly in excess of the total appropriations of the Legislature and therefore presumably in excess of the needs of the Territory.

6. That at the time the act in question was made into law it was "openly claimed by the Legislature that the purpose of the passage of said chapter of the Laws of Alaska for 1923 was to regulate the fishing and the catching of salmon."

7. That the term "cannery" as employed in the act is too vague and indefinite.

To these contentions the respondent answers:

1. That the territorial Legislature does have the right to regulate fishing so long as its enactments do not conflict with, *i. e.*, interfere with, the laws of Congress on that subject.

2. That the regulation of canning or of other industry dependent upon fishing is not in conflict with any "fish laws" of Congress.

3. That, for the purpose of taxation, industries may be classified upon the basis of the amount of "net income," "gross income," or "amount of out-

put," and a graduated or progresive tax may be levied upon each class, although there be no police authority associated with the taxing power.

4. That though there be no police power or regulatory authority over an industry, an excise tax is not void because it is so levied as to regulate the industry.

5. That if a law be enacted by virtue of a taxing power the courts will not inquire whether it was intelligently, or even honestly, enacted.

6. That an excise tax so levied as to rest proportionately heavier on a large output than on a small output is a reasonable attempt at apportioning the tax in proportion to the ability of the various establishments engaged in a business rendered hazardous by the irregularity and uncertainty of the run of fish each season in the various localities of the Alaska coast.

7. That the Court will not look behind the statute to inquire into the motives of the Legislature.

8. The Territory has no authority to incur indebtedness and the Legislature must therefore take care to provide sufficient funds to meet all appropriations, and the income from licensee being uncertain, ample provision must be made to avoid a deficit.

9. The meaning of the term "cannery" is not involved because in each count the plaintiff alleges defendant operated "a cannery" at a place named, and defendant answers that it did operate "a cannery" as alleged.

ARGUMENT.

I.

Territory Has Police Power Over Fisheries.

The tax in question is assailed on the theory that the law in question is not a revenue measure but purely a regulatory measure, and that the Legislature has no police power over the canning industry.

It is conceded that if the local Legislature has any regulatory authority over the industry of canning salmon the petitioner has no cause for complaint.

An examination of the acts conferring power upon the local Legislature becomes, therefore, necessary:

The Legislature of the Territory of Alaska was created by Act of August 24, 1912 (37 Stat. at L. 512 (ch. 387)).

In legislating for a territory Congress acts in a dual capacity: It exercises the Federal functions bestowed upon it by the sovereign States, and it also exercises the plenary powers of a local territorial legislature.

Binns *vs.* United States, 194 U. S. 486.

The latter authority may be delegated, and by the act above mentioned, and known as the Organic Act, was delegated to the Legislature of Alaska, with certain express reservations.

The legislative authority is conferred by Section 9 (Appendix B) of the Organic Act. This section provides that "the legislative powers of the Territory shall extend to all rightful subjects of legislation." Had the act stopped at

that point the sentence quoted would have delegated to the Legislature all the authority which Congress itself possessed over the Territory exclusive of the Federal functions.

But several limitations are entailed upon the power delegated. One of those limitations is contained in the clause from Section 3 (Appendix A) relied upon by petitioner. That clause reads as follows:

> "That the authority herein granted to the Legislature to alter, amend, modify or repeal laws in force in Alaska shall not extend to the * * * game, fish and fur-seal laws * * * of the United States applicable to Alaska."

It is now contended that this inhibition against altering, amending, modifying or repealing certain statutes then in existence regulating the fisheries not only withholds from the Legislature all police power over the catching of fish, but also deprives the Legislature of all police power over the shore industries dependent upon fishing.

In the case at bar the Circuit Court of Appeals made a statement which would seem to assume that the Legislature has no police authority over fisheries in Alaska, and counsel assumes this to be justified by the case of Auk Bay Salmon Co. *vs.* United States, 300 Fed. 907.

In the first place, it should be noted that the Auk Bay case simply decided that a certain statute enacted by the Legislature establishing in certain districts a period of ten days during which fishing of salmon was prohibited was void. The Circuit Court of Appeals held this statute an attempt to modify the Congressional Act which established a closed season of thirty-six hours at the end of each week. Nothing else was decided.

In the second place, it is my firm belief the court, in rendering that decision, overlooked former decisions by this Court, because it is well settled that where the territorial law and the Congressional law do not interfere with each other, and where both are operative and enforcible simultaneously, they cannot be held to conflict.

In the third place, regulation of shore industries cannot be said to be modification of the rules prescribing the methods for catching the fish.

The present chapter will deal with the police power over fisheries. The next will deal with the police power over the shore industries dependent on fishing.

The Fish Laws.

What are these "fish laws" referred to in the Organic Act which the Legislature is prohibited from repealing or modifying?

They consist of two Acts, one of June 14, 1906 (35 Stat. 263 (Ch. 3299)), and the other the Act of June 26, 1906 (34 Stat. 478 (Ch. 3547)).

Neither of these Acts confers any rights to fish. They merely place certain restrictions upon the time and manner of catching fish.

The common right of fishery is a right conferred by the common law and guaranteed by Magna Charta. It is coexistent with the common right of navigation.

Upon this common right of fishery the Congressional fish laws above referred to place certain restrictions aimed to conserve the fish supply.

What is a "modification" of those laws? Are additional restrictions upon the right to fish to be considered "modifications" of prior restrictions?

The test applied by this court, as will be presently demonstrated, is this: Can both laws operate simultaneously without interference one with the other?

The fish laws in question, being in their nature purely restrictive, can be "modified, altered or amended," or otherwise interfered with, only by relaxing them, or hampering their enforcement. No attempt has been made to do so. Additional restrictions cannot be said to relax, or conflict with, prior restrictions.

This view was expressed very explicitly by this court in Alaska Fish Salting and By-Products Co. *vs.* Smith, 255 U. S. 44. In that case the territorial Legislature was accused of having levied an excise tax for the purpose of putting a stop to fishing herring for use as fertilizers. Plaintiff took the very reasonable position that the levy of such a tax was an attempt to regulate fishing. This court unhesitatingly answered that the Legislature had such authority under the present Organic Act.

The court said:

> "If Alaska deems it for its welfare to discourage the destruction of herring for manure, and to preserve them for food for man or for salmon, and to that end imposes a greater tax upon that part of the plaintiff's industry than upon similar use of other fish or of the offal of salmon, it hardly can be said to be contravening a Constitution that has known protective tariffs for a hundred years, * * *. We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the Legislature has the full power of taxation."

This is a clear pronouncement that the Legislature of Alaska has authority to use its taxing power not only to

limit fishing but to absolutely stop fishing. Why, then, may not the same power be employed in the same manner to limit or regulate canning?

In a still more recent case (Haavik *vs.* Alaska Packers Association, 263 U. S., 510), this court held that in the exercise of its taxing power the Legislature had authority to discriminate against non-resident fishermen and in favor of resident fishermen, a tax of five dollars having been levied upon the former and none upon the latter. The tax was confessedly regulatory in its nature and purpose. But it was held good. The court said:

> "Plainly, we think, the territorial Legislature had the authority * * * unless, for want of power, Congress itself could not have laid them (the taxes) by direct action."

Referring particularly to the discriminatory character of the tax the court says:

> "The tax applies only to non-resident fishermen; citizens of every State are treated alike. Only residents of the Territory are preferred. This is not wholly arbitrary or unreasonable and we find nothing in the Constitution which prohibits Congress from favoring those who have acquired a local residence and upon whose efforts the future development of the Territory must largely depend."

In support of this doctrine the Alaska Fish Salting and By-Products case is cited as authority by the court.

In the Haavik case the right of the Legislature to regulate fishing is the fundamental doctrine and clearly implied, if not expressed.

Conservation of the fisheries was the sole purpose of Congress in withholding from the Legislature the right to repeal or modify the fishing restrictions in force at the time the Organic Act was passed. It was feared that the people of the Territory might not be able to withstand the onslaught of those who were thought to have a predatory disposition towards the fishing grounds. That the local Legislature would be too strict in its conservation policies was certainly never considered possible. In the light of these facts the language of the Organic Act must be construed. Is it not fair, then, to assert, that the Federal fish laws merely represent the most liberal terms on which Congress would permit fishing in Alaska waters, and that the local Legislature was at liberty to enact as many more restrictions as it found necessary for the perpetuation of the Territory's main industry?

There is certainly nothing in the Organic Act to lend support to the contention that Congress meant to prohibit the Legislature from protecting the fishing grounds against depletion in event the Congressional enactments were found inadequate.

If the language employed be insufficient to dispel all doubt on this subject, the debate on the floor of the House, when the clause in Section 3 of the Organic Act was under discussion, is surely ample for that purpose:

The bill, which is now the Organic Act, came up for argument on Wednesday, the 24th of April, 1912. In its original form the proviso in Section 3 was as follows:

> "That the authority herein granted to the Legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal or other general laws of the United States."

And nothing was there said about the game or the fish. Whereupon the following occurred:

"Mr. Willis: Mr. Chairman, I offer the following amendment, which I send to the desk and ask to have read.

The clerk read as follows:

Line 9, page 23, after the word 'States,' insert the words 'or to the game laws of the United States applicable to Alaska.'

Mr. Mann: Why not make it game and fish laws?

Mr. Wickersham: Mr. Chairman, I think the fish laws ought to be left alone.

Mr. Mann: Why not make it game and fish laws, so that they cannot repeal the fish laws? They can pass new fish laws.

Mr. Willis: Mr. Chairman, I will accept that amendment, and ask unanimous consent that it be so modified, and reported as modified.

The Chairman: Without objection, the amendment will be so modified, and the clerk will report the amendment as modified.

The clerk read as follows:

Line 9, page 23, after the words 'State,' insert the words 'or to the game and fish laws of the United States applicable to Alaska.'

Mr. Wickersham: Mr. Chairman, I do not think that the word 'fish' ought to be in there. I think the fisheries in Alaska need protection. They belong to the people of the State or to the Territory, and they do not belong to the Government of the United States. They are not now being protected. They are not now being conserved, and if this Legislature will do something toward conserving and protecting the fish it ought to be allowed to do it. This simply bars the Legislature from protecting the fisheries in that Territory, and it ought not to be in the bill.

Mr. Mann: The gentleman will notice this provision does not apply to passing laws, but only to the repealing of laws.

Mr. Willis: It seems to me the observation of the gentleman from Illinois answers the objection of the gentleman from Alaska. It simply provides, if it shall be adopted, that the Legislature of the Territory of Alaska shall not have the power to alter, amend, or repeal the United States fish or game laws now in force in the Territory. It does not take away from the Legislature the power to pass additional laws of that character. It seems to me that meets the objection.

Mr. Wickersham: I think they ought to be allowed to amend them.

Mr. Willis: We have a Federal fish law in Alaska. The gentleman is not objecting to that.

Mr. Wickersham: No.

Mr. Willis: That is all this amendment provides; that the Legislature shall not have the power to amend the present fish or game laws.

Mr. Wickersham: What does that mean?

Mr. Willis: It means that the present law shall stand.

Mr. Flood, of Virginia: Suppose Congress passes a law revising and extending the fish laws there?

Mr. Willis: Well, undoubtedly that will be the paramount law of Alaska.

Mr. Flood, of Virginia: What will be the effect of the gentleman's amendment?

Mr. Willis: The effect of this amendment will be, as I understand it, simply to take away from the Legislature of Alaska the power to amend the fish or game laws now in effect in Alaska.

Mr. Flood, of Virginia: It would not have the effect to take away from the Legislature of Alaska the power to amend the fish laws we hereafter pass.

Mr. Willis: No; I do not think it would, as I have worded it, although I did not have that in mind when I drafted the amendment.

Mr. Mann: They would not have that power.

Mr. Willis: They would not have that power now.

Mr. Flood, of Virginia: The gentleman is aware of the fact there is a proposition to revise the fish laws?

Mr. Willis: Yes; I think the bill is a good one and ought to pass.

Mr. Flood, of Virginia: And will in all probability become the law.

Mr. Willis: It seems to me this meets the objection that has been raised in a perfectly fair manner, and I think it is a fair objection; but I do not believe the Legislature ought to repeal the present game or fish laws.

Mr. Mann: We have endeavored to provide in a way for the conservation of the fisheries and game up there. We ought not to permit those laws to be repealed; but, if they want to make them more stringent, and probably do, they ought to have that right.

Mr. Flood, of Virginia: I do not think the amendment means anything; but, if it will please anybody to put it in, why, let it go.

Mr. Wickersham: I shall withdraw my objection.

The question was taken, and the amendment was agreed to."

(Vol. 48, part 6, page 5288, Congressional Record, 62d Congress, Second Session.)

This dual authority is no novelty in our system of government. It permeates nearly all of our institutions and has become recognized as salutary wherever practically available. I shall cite some illustrations:

The principle has been applied to the mining laws, where

this duality of authority is yet maintained. Said the Court of Appeals in Northmore *vs.* Simmons, 97 Fed. 386:

> "The statute was intended to express the most liberal terms on which the United States would part with its mining claims. No State Legislature nor local mining regulation may grant more favorable terms than those which are demanded by the statute. It contains the full extent of the requirements of the United States."

It was then held that additional requirements might be imposed by local legislatures.

To the same purport are the following:

Erlrardt *vs.* Boaro, 113 U. S. 527;

Mining Co. *vs.* Kerr, 130 U. S. 256;

Sissons *vs.* Sommers, 55 Pac. 829.

It has been held by this Court that though Congress, in pursuance of its constitutional authority, prescribe rules and regulations for the use and occupancy of public lands, the individual states have authority to enact police regulations covering the same field, and these police regulations are valid unless they contravene the regulations promulgated by Congress.

McKelvey *vs.* U. S., 260 U. S. 353 (358).

The same duality of authority of State and Federal Government is recognized in interstate commerce regulations; and the same rule of holding both state and Federal regulations valid obtains in that field.

Carey *vs.* South Dakota, 250 U. S. 118 (122);

Savage *vs.* James, 225 U. S. 501;

Reid *vs.* Colorado, 187 U. S. 148;
Missouri, K. & T. R. Co. *vs.* Haber, 169 U. S. 613;
Northern P. R. Co. *vs.* North Dakota, 250 U. S. 135 (150*b*).

The principle was applied to the Migratory Bird Act in the case of Carey *vs.* South Dakota, *supra,* where it was held that State laws enacted to protect migratory birds were not rendered void by the Congressional enactment which expressly provided that those birds "shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided for."

The logic of this Court upon which that decision was based is applicable to the case at bar. The Court said:

> "It is, however, urged that Congress has manifested its intention to assume exclusive jurisdiction of the subject; and that the failure to make any provision in the Federal act concerning shipping evidences the purpose of Congress that the shipping of game birds shall not be prohibited. This argument rests upon the clause which declares that the migratory birds 'shall hereafter be deemed to be within the custody and protection of the Government of the United States.' But that clause may not be read without its context; and the words immediately following show that the custody and protection is limited to prohibiting their being 'destroyed or taken contrary to regulations' which are to fix the closed seasons in the several zones."

The Court then added, that the intent to supersede the exercise by the State of its police powers is not to be implied

unless the act of Congress, fairly interpreted, is in *actual conflict* with the law of the State.

In support of this statement the Court cited Savage *vs.* James, 225 U. S. 501, and Missouri, K. & T. Co. *vs.* Haber, 169 U. S. 613. The former of these two cases involved the question of whether or not a State law enacting certain rules and regulations for inspection and labeling of "concentrated commercial feeding stuff" was void as to its application to original packages transported in interstate commerce, and whether it invaded the same field covered by the food and drug act.

The argument in that case, as in the case at bar, was that those acts which were not by Congress expressly prohibited must be construed as permitted, and that additional limitations is alteration or interference.

This Court answered:

> "Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a State law enacted for these purposes. But it did not so declare. There is a proviso in the section defining misbranding for the purposes of the act, that 'nothing in this act shall be construed' as requiring manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas 'except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.' We have already noted the limitations of the provisions referred to. It is clear that this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions.

"Is, then, a denial to the State of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For when the question is whether a Federal act overrides a State law, the entire scheme of the statute must, of course, be considered, and that which needs must be applied is of no less force than that which is expressed. *If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the State law must yield to the regulation of Congress within the sphere of its delegated power.*

"*But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the State.* This principle has had abundant illustration." (Italics mine.)

In the case of Missouri, K. T. R. Co. vs. Haber, *supra*, the question was as to whether an inspection law of a state was in conflict with a similar law on the same subject enacted by Congress. The test which this court applied should be applied in the case at bar. It was thus stated:

"*May not the statutory provisions* (of the State) *stand without embarrassing the execution of the Act of Congress?*" (Italics mine.)

It was held both acts could be enforced without interference with each other.

Exactly the same may be said about the fish laws of the Territory. Both those of Congress and those of the Legislature may be enforced at the same time. And that is the test.

The American doctrine is clearly stated by Mr. Chief Justice White in Northern P. R. Co. *vs.* North Dakota, 250 U. S. 135 (150*b*), as follows:

> "Although authority to regulate within a given sphere may exist in both the United States and in the States, when the former calls into play constitutional authority within such general sphere the necessary effect of doing so is, that *to the extent that any conflict arises* the State power is limited, since *in case of conflict* that which is paramount necessarily controls that which is subordinate." (Italics mine.)

The debate in the House shows that the men who enacted he Organic Act of Alaska had this very rule clearly in mind. So, also, under the Eighteenth Amendment to the Constitution, the rule has been applied:

Vigliotti *vs.* Pennsylvania, 358 U. S. 403.
Kennedy *vs.* U. S., 265 U. S. 344.
Hixson *vs.* Oakes, 265 U. S. 254.

This principle was applied to the Alaska Prohibition Act y Circuit Court of Appeals.

Abbate *vs.* U. S., 270 Fed. 735.

Section 9 of the Organic Act also, by reference, incorrates the Act of July 30, 1886 (24 Stat., 170 (Ch. 818)), to the limitations imposed upon the legislative powers. hat act provides, *inter alia*, that the Legislature

"shall not pass local or special laws in any of the following cases, that is to say:

* * * * * * *

"The protection of game and fish."

Ordinarily no one would deny that this is a recognition of the authority to protect game and fish so long as the laws enacted for that purpose are general and not local in character.

The Organic Act may, therefore, be said to contain two limitations upon the power of the Legislature to enact fishing regulations, to-wit: such regulations must not be local in extent nor must they conflict with the regulations enacted by Congress.

That the salmon of Alaska was being depleted because of insufficient restrictions was notorious; that the Legislature had authority to impose additional restrictions was never seriously doubted, but the nature of the salmon fishing is of such a character that it is difficult if not impossible to enact general laws on the subject which are both just and effective.

Nevertheless, in 1923 the local Legislature enacted Chapter 95 of the Laws of 1923 (Appendix C) to supplement the Federal Laws. The principal and most difficult question presented was whether or not this Act was "local" in character. The Circuit Court of Appeals of Ninth Circuit, in Auk Bay Salmon Canning Co. *vs.* United States, 300 Fed. 907, held the Act void for the following reasons:

The Congressional law provided for a closed period of thirty-six hours at week-end throughout the season. The Territorial law provided for the establishment of an *additional* closed period of ten consecutive days in some districts

during the middle of the salmon run. The court held that this was an extension of the closed period established by Congress and as such an amendment of the Congressional law. The decision was carefully and expressly limited to that point.

Nevertheless, counsel in their arguments in the case at bar before the Circuit Court of Appeals assumed the decision to adjudicate definitely that the Legislature had no authority whatever to prescribe any fishing regulations. So skillfully was this done that the court below, evidently without examination, accepted counsel's premises as undisputed and assumed that it was settled that the Legislature had no police power whatever over fisheries.

For the reasons heretofore assigned respondent not only questions the correctness of the decision in the Auk Bay case, but also denies that that case can be construed to have the sweeping effect accredited to it by counsel.

Under this topic it remains to be observed that more than one year after this very tax law here in question had been enacted, more than three months after it had been upheld by the District Court, more than one year after Chapter 95 had been enacted, and more than six months after that act had been held valid by the District Court,—and while both those laws were presumably good, the Congress, on June 6th, 1924, enacted a new fish law for Alaska. (Ch. 272 Stat., First Session 68th Congress.) Section 8, pg. 467, of this law contains this significant provision:

> "Nothing in this Act contained, nor any powers herein conferred upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or

> licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by the Act of Congress approved August 24, 1912, 'To create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes.'"

This is at least a reasonably clear recognition by Congress that the Legislature had some regulatory authority over fisheries, that a dual authority over the subject did exist, and that this dual authority was designed to be continued in the future.

If Congress had regarded the statutes then actually in force in the Territory, whether tax laws or police regulations, as *ultra vires*, something in some form would have been said about it in the new fish law, instead of, in the most sweeping language, asserting that there was no intention to abridge the power of the Territory. Again it was obviously conservation that was aimed at.

The construction which Congress has thus placed upon its own enactments should count for something.

The new fish law for Alaska is not essentially different in principle from the Migratory Bird Law of Congress. Both place the authority to prescribe regulations in the Department of Commerce and neither denies to States or Territory power to add further restrictions.

II.

Regulation of Canning is Not Regulation of Fishing.

In the foregoing chapter I have endeavored to show that the only limitation upon territorial authority over fisheries consists of prohibiting the Legislature from relaxing the

regulations which have been enacted by Congress for the purpose of conserving the fish supply.

But, assuming that this view be incorrect, there is certainly nothing in the statutes to indicate that it was the intent of Congress to deny to the Territory full police authority over the shore industries whether the same be dependent upon the fish in the ocean, or the trees in the National forest, or the coal and oil in the public lands. To assume that the Legislature has not police authority over the manufacture of fish products unless it has full authority over the catching of the fish, would justify the assumption that the Legislature has no police authority over the sawmills or any other part of the lumber business where the timber used is cut on a Government reserve and where it has no authority over the trees before they were cut into logs, or the assumption that it has no authority over any industry dependent upon interstate commerce unless it also has jurisdiction over interstate commerce.

Analogous situations have frequently been passed upon by this Court. Thus:

Though Congress has no jurisdiction over corporate franchises granted by States and therefore may not tax such franchises, Congress may, nevertheless, levy a tax upon the transfer of shares of stock in a corporation existing under a State franchise.

Thomas *vs.* United States, 192 U. S. 363.

A tax upon bank notes is not a tax on the franchise of the bank.

Veazie Bank *vs.* Fenno, 8 Wall. 533.

An income tax upon a corporation, though not upon an individual engaged in the same business, is not a tax upon the franchise of the corporation.

Flint *vs.* Stone Tracy Co., 220 U. S. 108.

While the Federal Government may not regulate the descent of property or of conveyancing it may tax inheritance, legacies and other conveyancing,—and may do so by discriminatory classifications which have the effect of regulating.

Knowlton *vs.* Moore, 178 U. S. 41.

Though the Federal Government may not regulate a board of trade organized under a State law, it may tax the enjoyment of the privileges of such board of trade.

Nicol *vs.* Ames, 173 U. S. 509.

The subject of regulation of the canneries in Alaska has become a serious one. Congress has taken no steps in the matter. A faint attempt in that direction was made by the local Legislature in 1919 by the enactment of Chapter 59 of the laws of that year (Appendix D).

But this has proved inadequate, and the last Legislature passed the following Joint Resolution:

"SENATE JOINT RESOLUTION NO. 2.

IN THE LEGISLATURE OF THE TERRITORY OF ALASKA.

SEVENTH SESSION.

Be it resolved by the Senate and House of Representatives.

WHEREAS, at some canneries and salteries in the Territory, unsanitary conditions prevail and the

waters in the vicinity of many such establishments are often being polluted by offal deposited therein, which conditions are detrimental to the public in general and to the operators of the sanitary establishments in patricular; and

WHEREAS, housing facilities for the comforts of the employees as well as the moral atmosphere at many such establishments are often deplorable; and

WHEREAS, the contract system for the accomplishment of much of the labor thereat entail many abuses; and

WHEREAS, the enactment of effective laws to remedy these evils without injuring the conscientious operators involves many intricate problems,

Be it Resolved, That the Attorney General is hereby instructed to place himself in communication and conference with the United States Bureau of Fisheries and the principal canneries and salteries and to acquaint himself thoroughly with the situation referred to with a view of obtaining information enabling him to draft laws for the purpose of enforcing equitable, reasonable and effective rules and regulations at canneries, salteries and similar establishments for the purpose of abating the evils complained of and submit his recommendations with such bills for laws as he may find adequate and equitable to the next session of the Legislature."

Approved April 28, 1925.

SCOTT C. BONE,
Governor of Alaska.

Is all this beyond the power of the Legislature?

If it be not, it is because the Legislature has jurisdiction over the canning and salting industry.

But if such police jurisdiction exists, the objection to the present excise tax on the ground that it is regulatory must fall, for the police power may be exercised through the taxing power.

Hammond Packg. Co. *vs.* Montana, 233 U. S. 331.

If the Legislature has jurisdiction over the canneries, the courts will not pass upon the wisdom with which the jurisdiction is exerciesd.

III.

Classification by Amount.

The precise principle which petitioner relies upon to invalidate the tax here in question has proved extremely illusive. No statutory limitation upon the taxing power of the Territory is pointed out as transgressed, nor have any specific provisions of the Constitution been referred to as having been violated, unless it be the 5th and the 14th Amendments, which are casually alluded to in petitioner's brief.

Many of the cases cited by counsel as vindications of their contentions are decided under the equality clause of the 14th Amendment. But that Amendment is addressed to the States, not to the Territories, or to the Federal Government (Territory of Alaska *vs.* Troy, 258 U. S. 101, and Haavik *vs.* Alaska Packers Assn., 263 U. S. 510), and might, therefore, be disregarded without further consideration, but will, nevertheless, be referred to hereafter.

The 5th Amendment has often been invoked in this Court for protection against what has been thought unjust discrimination in tax levies, but without avail. In the recent

leading income-tax case, Brushaber *vs.* Union P. R. Co., 240 U. S. 1, this Court on this point said:

> "So far as the due process clause of the 5th amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution."

In the McCray case the Court said on this point:

> "Whilst undoubtedly both the 5th and the 10th amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. The contention on this subject rests upon the theory that the purpose and motive of Congress in exercising its undoubted powers may be inquired into by the courts."

Nevertheless, although there be no constitutional prohibition enjoining equality and uniformity in the Federal tax measures, it is insisted that "classification by amounts" and a tax levy progressively increasing for each unit of measurement within such classification is beyond the power of Congress or its agency, the Territory, and as such void.

The fallacy of counsel's subtle argument may be exposed by an illustration taken from the decisions of this Court.

Suppose a tax had been levied upon the net income of the canneries and that such tax had been graded upwards so as to increase progressively with the increase of the income until fifty per centum of the income above one hundred thousand dollars had been absorbed by the Territory,

while only five per cent of the net income below twenty-five thousand is so absorbed. This is conceded to be legal.

But why is it legal?

Here we have one person with a plant worth ten thousand dollars permitted to earn over two hundred per cent on his investment, while another with plants worth some twenty million dollars is permitted to earn less than one per cent.

This may appeal to some as inequitable, but it is substantially what has been held by this Court to be valid legislation and has passed beyond the range of argument.

Counsel argue that this is legal because the tax is upon the profits and not upon the volume of business. In this they are demonstrably mistaken. The tax would be as valid were it levied upon the gross income (Spreckles Sugar Ref. Co. *vs.* McClain, 192 U. S. 397) and increased in geometrical ratio with the increase of the volume of the business. Such a tax would more certainly than a net income tax place a definite limit upon the volume of business. But no constitutional reason can be assigned why such a tax is not valid, even when levied by the Federal Government which possesses no police power over the industries.

All the arguments presented by counsel in the case at bar were presented to this Court in the case of Clark *vs.* Titusville, 184 U. S. 329, and were there decided against petitioner's contentions, notwithstanding the fact that in that case the equality clause of the 14th Amendment applied and was appealed to for protection against "classification by amounts."

It is conceded that the principle applied in the inheritance-tax cases and the income-tax case would dispose of the case before us in favor of respondent in event that principle were

applicable to the case at bar. It is therefore contended by counsel that it is not applicable.

To escape the logic of Knowlton *vs.* Moore counsel insist that the Federal inheritance tax was sustained on the theory that the Government had power to impose any conditions it saw fit upon the descent or devolution of property.

This is an error. The Federal Government has no authority to regulate succession. That power is confided to the States exclusively. The objection raised to the Federal inheritance tax was, first, that it was an interference with the States' exclusive right to regulate succession, and, second, that it was not uniform, that it undertook to classify according to degrees of consanguinity as well as according to amounts of inheritance and legacies and imposed a different rate of tax upon all of such different classes. Degree of consanguinity and amount of inheritance could form no legal basis for classification for the purpose of taxation, so it was argued.

In Knowlton *vs.* Moore, 178 U. S. 82, this court effectively and for all time disposed of both contentions. In the discussion of the inheritance tax the Court asked and answered this question:

> "Can the Congress of the United States levy a tax of that character? The proposition that it cannot rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several States, therefore the levy by Congress of a tax on inheritances or legacies, in any form, is beyond the power of Congress, and is an interference by the National Government with a matter which falls alone within the reach of State legislation."

After a discussion of the problem the Court concludes:

> "Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient, and not upon the power of the State to regulate. This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice Marshall, 'that the power to tax involves the power to destroy.' This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists."

Coming to the next objection, viz: that the tax was not uniform and that the different rates were applied to arbitrary classifications which had no basis in any distinctions recognized by law, the Court held, that, though the criticisms of the law might be justified, the lack of uniformity complained of was in no manner repugnant to the Constitution. The only uniformity demanded by the Constitution, so said the Court, is "geographical uniformity" and the Court cannot add new restrictions upon the power of Congress to those already imposed by the Constitution.

It is also admitted that if the principle applied to the Federal income tax law also applies to the law involved in this case the petitioner is foreclosed by the ruling of this Court in Brushaber *vs.* Union P. R. Co., 240 U. S. 1.

Counsel undertake to brush this decision aside by a nonchalant assertion that the income tax is levied under a new amendment to the Constitution which confers new powers not applicable to the excise taxes.

But nothing could be much farther from the truth, as was

pointed out by Mr. Chief Justice White in the Brushaber case. The income tax is an excise levied under Sec. 8, Art. I, of the Constitution, the same as is any other Federal tax.

In discussing the effect of the 16th Amendment, and after quoting it, the Chief Justice said:

> "It is clear on the face of this text that it does not purport to confer power to levy income taxes in a general sense,—an authority already possessed and never questioned, or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed, in the light of the history which we have given and of the decision in the Pollock Case, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock Case was decided; that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment."

Having thus settled the subject that the income tax was imposed under the general authority to levy excises, the Court considered the complaints about arbitrary classifications and discriminations. These are enumerated on pages

21 to 24, inclusive, of the opinion. Referring to these complaints the Chief Justice, in passing, remarks:

> "Their want of legal merit is at once apparent since it is settled that the clause (No. 8, Art. 1) exacts only a geographical uniformity, and there is not a semblance of ground in any of the propositions for assuming that a violation of such uniformity is complained of."

After citing a number of authorities in support of this proposition the Court continues:

> "So far as the due process clause of the 5th Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause."

Answering the argument that the inequalities and discriminations were so arbitrary as to demonstrate the tax is not primarily a revenue measure, but a police regulation, the Court said:

> "It is true that it is elaborately insisted that although there be no express constitutional provision prohibiting it, the progressive feature of the tax causes it to transcend the conception of all taxation and to be a mere arbitrary abuse of power which must be treated as wanting in due process. But the proposition disregards the fact that in the very early history of the Government a progressive tax was im-

> posed by Congress, and that such authority was exerted in some, if not all, of the various income taxes enacted prior to 1894 to which we have previously adverted. And over and above all this the contention but disregards the further fact that its absolute want of foundation in reason was plainly pointed out in Knowlton *v.* Moore, and the right to urge it was necessarily foreclosed by the ruling in that case made."

After citing leading decisions by this Court in support of the foregoing, the Chief Justice concludes:

> "In fact, comprehensively surveying all the contentions relied upon, aside from the erroneous construction of the amendment which we have previously disposed of, we cannot escape the conclusion that they all rest upon the mistaken theory that although there be differences between the subjects taxed, to differently tax them transcends the limit of taxation and amounts to a want of due process, and that where a tax levied is believed by one who resists its enforcement to be wanting in wisdom and to operate injustice, from that fact in the nature of things there arises a want of due process of law and a resulting authority in the judiciary to exceed its powers and correct what is assumed to be mistaken or unwise exertions by the legislative authority of its lawful powers, even although there be no semblance of warrant in the Constitution for so doing."

In the recent case of Stebbins *vs.* Riley, 268 U. S. 137, Mr. Justice Stone made the following decisive observation with reference to a state inheritance tax and the Federal Constitution.

> *"There is no constitutional guaranty of equality of taxation."* (Italics mine.)

It only remains to be observed that the progressive feature of the tax here in question is not nearly as galling, nor nearly as regulatory in its effect, as the progressive features of the inheritance tax or the income tax. As this tax is demonstrably levied under the same power which supports the inheritance tax and income tax, and as the Congress had no more regulatory authority over the subjects taxed than has the territorial Legislature over fisheries—even if petitioner's contention be correct, the rule of law which applies to one must apply to the other, unless at this point there exists an anomaly of the law.

But in Clark *vs.* Titusville, 184 U. S. 329, this Court held there is no such anomaly. That case involved the validity of a city ordinance which imposed a graduated license tax upon mercantile establishments. The classifications were based upon volume of business. The objections were that the differences were not in kind, but only in amount or value, and that the so-called classes are subdivisions without regard to a common ratio, either as between the several subdivisions or as between the members of the subdivisions.

In support of his contentions plaintiff invoked the equality clause of the 14th Amendment. The Court answered:

> "These objections are but the expressions of the effect of classifications by amount, and have been made before, and considered before by this Court, and the judgment has been adverse to the contention of plaintiff."

* * * * * * *

"Classification by amount came up for consideration and decision in Magoun *vs.* Illinois Trust & Sav. Bank, 170 U. S. 283, and was sustained. That case, plaintiff in error recognizes, may be urged against his contention, and attempts to limit its decision to the power of a State over inheritances, and to explain by that power not only the taxes imposed, but the discriminations which were claimed to have resulted from grading the taxes by the amount of the legacy. This, we think, is a misunderstanding of the opinion."

Referring to the equality rule of the Fourteenth Amendment, the Court said, quoting from Magoun *vs.* Ill. T. & S. B.: "That rule does not require, as we have heretofore seen, exact equality of taxation. It only requires that the law imposing it shall operate *on all alike under the same circumstances.*" (Italics mine.)

The language quoted from the leading inheritance tax case is repeated in Flint *vs.* Stone Tracy Co., 220 U. S. 108, where it is applied to the Federal "corporation tax"; in Patten *vs.* Brady, 184 U. S. 608, to the Federal tobacco tax; in Spreckles Sugar Ref. Co. *vs.* McClain, 192 U. S. 397, to the *gross* income tax on sugar; in Brushaber *vs.* Union P. R. Co., to the Federal income tax. It is evident the doctrine is intended to be of general application and not to be limited to inheritance and legacies.

It has already been shown that the equality clause of the 14th Amendment does not apply in Alaska. But even if it did the law here in question would be valid.

That the Amendment does not deprive the States of the usual right to classify persons and occupations for the purpose of taxation (*a*) by amounts or volume, or (*b*) by degree of relationship, or (*c*) by place of residence.

Magoun *vs.* Ill. Trust & Sav. Bank, 170 U. S. 283;
Maxwell *vs.* Bugbee, 250 U. S. 525.

Classification by amount was first adopted by Congress for Alaska by the Act of March 3, 1899 (Sec. 460, p. 1336, Stat. L. 30), imposing certain license taxes. That statute is still in force. The Legislature has applied the same system to bakeries, cold-storage plants, laundries, meat markets, mercantile establishments, mining and other industries. In these the volume of business is measured by the value of the transaction as a matter of convenience. (See Appendix C.) In each case the tax is upon "the plant." A person operating several establishments must pay a separate tax on each. One who operates a chain of stores pays on the basis of the business done at each store, the same as a canner pays on the basis of the business done at each cannery.

The *reasonableness* of the clasification of Salmon canneries by the statute under consideration is discussed in chapter V of this brief.

IV.

The Purpose of the Tax is Not a Matter for the Courts.

The fact that an excise is regulatory in its effect, and must be assumed to be intended to be so, does not invalidate it on the theory that it is an unauthorized exercise of the police power. That must be considered as settled, so far as the law here assailed is concerned, by the decision of this Court in Alaska Fish Salting and By-Products Co. *vs.* Smith, 255 U. S. 44, where this Court, construing the same kind of a law enacted under the power here involved, said:

> "If Alaska deems it for its welfare to discourage the destruction of herring for manure, and to preserve them for food for man or for salmon, and to

> that end imposes a greater tax upon that part of plaintiff's industry than upon similar use of other fish or of the offal of salmon, it hardly can be said to contravene a Constitution that has known protective tariffs for a hundred years."

Even where the equality clause of the 14th Amendment applies the same rule would hold good.

Rast *vs.* Van Deman, & L. Co., 240 U. S. 342.

In the inheritance-tax cases the taxes considered had very clearly the effect of regulating devolution of property by a progressively increased tax on the larger inheritances and legacies, but that constitutes no legal objection to the tax.

That the income tax has the effect of regulating incomes by discrimination against the larger incomes was vigorously asserted by those who assailed the law, but the point was not considered available as a ground for attack.

In Veazie Bank *vs.* Fenno, 8 Wall. 533, this Court held that an excise upon notes of State banks, which necessarily drove those notes out of circulation, did not invalidate the law as a revenue measure, even though it is not, and was not, and could not be, revenue-producing, and though it must be assumed that Congress purposed the natural consequences of its own acts.

In McCray *vs.* United States, 195 U. S. 27, this Court held that an excise upon colored oleomargarine forty times as high as upon uncolored oleomargarine was still only a tax, although it had the effect of putting a stop to the sale of oleomargarine in competition with butter, and although Congress must be deemed to have intended that effect.

In Flint *vs.* Stone Tracy Co., 220 U. S. 108, and Patton *vs.* Brady, 184 U. S. 608, the same rule was adhered to.

In United States *vs.* Doremus, 249 U. S. 86, the same doctrine was applied to the narcotic act.

In the last case the Court summarized the doctrines of its many previous decisions on this subject in the following language:

> *"The mere fact that part of its purpose, or perhaps its main purpose, is to promote some political, economic, social, or moral end, is not sufficient to render it unconstitutional in the courts."* (Italics mine.)

It can serve no purpose in this brief to reiterate the reasons assigned by this Court in the various cases heretofore decided, and where the Court has declined to review the wisdom, the expediency, the honesty or purpose of a tax law. From the authorities already cited it must be considered settled beyond argument that this Court will pass only upon the jurisdiction of the legislative department, but will decline to consider the question of whether that jurisdiction has been abused. On any other theory every "protective tariff" would be rendered void.

In the oleomargarine case this Court said:

> "It being thus demonstrated that the motive or purpose of Congress in adopting the act in question may not be inquired into, we are brought to consider the contentions relied upon to show that the act assailed were beyond the power of Congress, putting entirely out of view all considerations based upon purpose of motive."

Answering the argument that a tax which is so excessive as to defeat its own purpose as a revenue measure must be considered in its nature purely regulatory and therefore beyond the power of Congress, the Court quotes the following excerpt from the opinion of Mr. Chief Justice Chase quoted in Spencer *vs.* Merchant, 125 U. S. 355:

> "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom the members are elected."

Again, quoting from the McCray case:

> "The judicial power may not usurp the functions of the legislature in order to control that branch of the government in the performance of its lawful duties."

In Flint *vs.* Stone Tracy Co., this Court reiterated its former assertions that:

> "The limitation of (geographical) uniformity was deemed sufficient by those who framed and adopted the Constitution. The courts may not add others."

And, again, in the same case:

> "As we have seen, the only limitation upon the authority conferred is uniformity in laying the tax, and uniformity of the tax to all persons or corporations who may come within its operation, but is limited to geographical uniformity throughout the United States."

In the income-tax case (Brushaber *vs.* Union P. R. Co.) the Court said:

> *"It is true that it is elaborately insisted that though there is no express constitutional provision prohibiting it, the progressive feature of the tax causes it to transcend the conception of all taxation and to be a mere arbitrary abuse of power which must be treated as wanting in due process. But * * * the right to urge it was necessarily foreclosed by the ruling in Knowlton vs. Moore."* (Italics mine.)

The doctrines of this Court on this subject is clearly set forth in the McCray case in the following language:

> "Even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the 5th Amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where, to the judicial mind, it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress."

The child-labor case presented an entirely different situation. The act there considered did not even on its face purport to be a revenue measure. It was an open attempt at prescribing certain regulations for the conduct of certain industries, and the alleged tax was only a penalty for violating the regulations prescribed.

V.

The Reasonableness and Necessity of the Law.

Just as the executive department will serve any writ or process which on its face appears to be within the jurisdiction of the court whence it issued, so also do the courts enforce any statute which upon its face appears to be within the jurisdiction of the Legislature.

Until this Court undertakes to sit in judgment upon the honesty and intelligence of the Congress, until then will every attempt to give Congress jurisdiction to sit in judgment upon the wisdom of the decisions of this tribunal fail.

Yet counsel seem to think that the purpose of the members of the Legislature of Alaska in enacting a given statute is a question of fact which, upon issues joined, must be tried before and passed upon by a jury.

Counsel argues that because the allegations of improper motive set out in the complaint are demurred to they must be considered admitted. But it would seem elementary that a demurrer to an immaterial or frivolous allegation does not render it either material or pertinent. The statute must be left to speak for itself. It cannot be either aided or assailed by evidence aliunde. In the Alaska Fish Salting and By-products case this Court said:

"The acts must be judged by their contents, not by the allegations as to their purpose in the complaint."

Reasonableness of Classification.

That the grading of the tax so as to apparently fall heavier upon the owner of a cannery producing a large pack than upon the owner of one producing a small pack is just, and fair, and reasonable will appear upon reflection.

Salmon canning is a hazardous business. The "run" of salmon differs materially in the different places during the different seasons. No one can predict what the run will be. Yet preparation must be made for a "full" pack, which means the maximum capacity of the cannery. Now, the courts will take judicial notice that in the business of managing a salmon cannery in Alaska there is an irreducible minimum of expense which must be borne, regardless of the size of the pack. The larger the pack at any cannery the proportionately less charge enters into the cost of production per case. Of several canneries in various localities of the Territory each may be prepared for a pack of 100,000 cases, but one puts up 10,000 cases, another 30,000 cases, and a third 75,000 cases. As a result, the one with the small pack loses money, the one with 30,000 cases comes out even, and only the one with 75,000 cases or more makes a profit.

The gradation of the tax in proportion to the amount of the pack is a reasonable attempt at equalizing the burden.

Excess of Tax Over Requirements.

Section 9 of the Organic Act provides:

"Nor shall the Territory, or any municipal corporation therein, have power or authority to create or

> assume any bonded indebtedness whatever; nor to borrow money in the name of the Territory or of any municipal division thereof; nor to pledge the faith of the people of the same for any loan whatever, either directly or indirectly; nor to create, nor to assume, any indebtedness, except for the actual running expenses thereof; and no such indebtedness for actual running expenses shall be *created or assumed in excess of actual income of the Territory municipality for that year,* including as a part of such income appropriations then made by Congress, and taxes levied and payable and applicable to the payment of such indebtedness and cash and other money credits on hand and applicable and not already pledged for prior indebtedness."

This means that unless the taxes for each year are sufficient to pay the running expenses, the governmental functions must come to a stop, because there is no authority to create any indebtedness beyond the current income. For this reason it is necessary for the Legislature to make sure that the appropriations do not exceed the revenues, or, to state this proposition inversely, to make sure the taxes collectible exceed the appropriations.

The court will take judicial notice that the Legislature of 1923 appropriated, by twenty separate public acts, a total of $1,655,307.93 out of the future revenues of the Territory for the two succeeding twelve months.

All the revenues of the Territory are raised by license taxes upon business. These are so very fluctuating, depending largely upon the run of salmon and the price of copper, that it is difficult to calculate in advance within twenty-five per cent what the revenues for a given year will be. If the decrease in the salmon run had continued at the rate of de-

crease during the six years prior to 1922, the income of the Territorial treasury would have been insufficient to meet the appropriations.

From the annual reports of the Bureau of Fisheries I submit the following data as to the amount of salmon packed in Alaska each year from 1917 to 1923, inclusive:

Year.	Total cases of all varieties.	Number of cases of Reds.
1917.....	5,947,286	2,488,381
1918.....	6,605,835	2,533,737
1919.....	4,583,688	1,277,661
1920.....	4,429,463	1,500,738
1921.....	2,596,826	1,765,798
1922.....	4,501,652	2,070,658
1923.....	5,035,697	1,859,496
1925, estimated.....	.....	1,003,000

If this table proves nothing else, it proves the uncertainty of the salmon pack as a source of revenue for the Territory.

In connection with what has already been pointed out, it should be noted that the increase or decrease is not uniform throughout the Territory, but some sections may have a big run while other sections during the same year may be almost total failures.

When counsel assert that the revenues produced by the law assailed were in excess of the needs of the Territory, it may be pointed out that for the last fifteen years the Congress has annually had to come to the rescue of the Territory by appropriations of from $400,000 to $1,000,000 for roads and trails and other internal improvements which the Territory was unable to provide. Failure to make appropriations exhausting all the prospective revenues was only due to caution to not incur expense beyond the income.

VI.

Uncertainty of the Word "Cannery."

It is claimed that the word "cannery" is so uncertain that it is impossible to state whether it is intended to apply to one building or to several buildings. The same objection might with equal justice be made to the tax on "meat markets," "laundries," "bakeries," "power plants," "telephone plants," "mercantile establishments," referred to in the tax law; but so far no difficulties have arisen over these designations save in the minds of counsel.

Obviously, the question is not before the Court, because in the complaint plaintiff alleges, in each count, that defendant at a certain place mentioned operated "a cannery" where a certain specific number of cases of each variety of salmon were canned. Defendant answers that this allegation is true; that at said place it did operate "a cannery" at which it packed the number of cases alleged. There is therefore nothing at issue on that point.

Respectfully submitted,

JOHN RUSTGARD,
Attorney General of Alaska,
Attorney for Respondent.

APPENDIX A.

Section 3 of Organic Act.

Section 3. That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature: Provided, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States.

APPENDIX B.

Section 9 of Organic Act.

Section 9. The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or property of residents; nor shall the legislature grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the affirmative approval of Congress; nor shall the legislature pass local or special laws in any of the cases enumerated in the Act of July Thirtieth, eighteen hundred and eighty-six; nor shall it grant private charters or special privileges but it may, by general act, permit persons to associate themselves together as bodies corporate for manufacturing, mining, agricultural, and other industrial pursuits, and for the conduct of business of insurance, savings banks, banks of discount and deposit (but not of issue), loans, trust, and guaranty associations, for the establishment and conduct of cemeteries, and for the construction and operation of railroads, wagon roads, vessels, and irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association, but the authority embraced in this section shall only permit the organization of corporations or associations whose chief business shall be in the Territory of Alaska; no divorce be granted by the legislature, nor shall any divorce be granted by the courts of the Territory, unless the applicant therefor shall have resided in the Territory for two years next preceding the application, which residence and all causes for divorce shall

be determined by the court upon the evidence adduced in open court; nor shall any lottery or the sale of lottery tickets be allowed; nor shall the legislature or any municipality interfere with or attempt in anywise to limit the Acts of Congress to prevent and punish gambling, and all gambling implements shall be seized by the United States marshal or any of his deputies, or any constable or police officer, and destroyed; nor shall spirituous or intoxicating liquors be manufactured or sold, except under regulations and restrictions as Congress shall provide; nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the Government; nor shall the Government of the Territory of Alaska or any political or municipal corporation or subdivision of the Territory make any subscription to the capital stock of any incorporated company, or in any manner lend its credit for the use thereof; nor shall the Territory, or any municipal corporation therein, have power or authority to create or assume any bonded indebtedness whatever; nor to borrow money in the name of the Territory or of any municipal division thereof; nor to pledge the faith of the people of the same for any loan whatever, either directly or indirectly; nor to create, nor to assume, any indebtedness, except for the actual running expenses thereof; and no such indebtedness for actual running expenses shall be created or assumed in excess of the actual income of the Territory or municipality for that year, including as a part of such income appropriations then made by Congress, and taxes levied and payable and applicable to the payment of such indebtedness and cash and other money credits on hand and applicable and not already pledged for prior indebtedness: Provided, That all authorized indebtedness shall be paid in the order of its creation; all taxes shall be uniform upon the same class of subjects and shall be levied and collected

under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum of the assessed valuation of the property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of two per centum of the assessed valuation of property within the town in any one year: Provided, That the Congress reserves the exclusive power for five years from the date of the approval of the Act to fix and impose any tax or taxes upon railways or railway property in Alaska, and no acts or laws passed by the Legislature of Alaska providing for a county form of government therein shall have any force or effect until it shall be submitted to and approved by the affirmative action of Congress; and all laws passed, or attempted to be passed, by such legislature in said Territory inconsistent with the provisions of this section shall be null and void: Provided further, That nothing herein contained shall be held to abridge the right of the legislature to modify the qualifications of electors by extending the elective franchise to women.

APPENDIX C.

Chapter 95, Laws of Alaska for 1923.

Section 1. That it shall be unlawful to take or fish for salmon for commercial purposes, except by trollers, in the waters of Alaska between the 57th and 60th degrees of north latitude and east of 139th meridian west longitude from the tenth day of August to the first day of September in each year.

Section 2. That it shall be unlawful to take or fish for salmon for commercial purposes, except by trollers, in the waters of Alaska south of the 57th degree of north latitude and east of 139th meridian from the 20th day of August to the 9th day of September in each year.

Section 3. That any person, firm or corporation violating any of the provisions of this Act shall be guilty of a misdemeanor, and upon conviction thereof for each and every offense be punished by a fine of not less than fifty dollars ($50.00) nor more than one thousand dollars ($1,000.00), or by imprisonment in jail for not less than ten days nor more than one year, or by both such fine and imprisonment, in the discretion of the court.

Section 4. This Act shall not be so construed as in anywise to alter, amend, modify or repeal any of the fish laws of the United States applicable to Alaska, or any Act of Congress whatsoever relating to the fisheries of Alaska whether designed to regulate the same or passed for any other purpose whatsoever, but all such laws and acts of Congress shall be and remain in full force and effect. The purpose of this Act is not to alter, amend, modify or repeal any of such laws, but to provide for further and additional regulation of the fisheries with a view of giving additional protection to the salmon and insuring a future supply thereof, and this Act shall be construed so as to carry out the intention herein expressed and not otherwise.

Section 5. An emergency is hereby declared to exist and this Act shall be in effect immediately upon its passage and approval.

Approved May 4, 1923.

APPENDIX D.

Chapter 59, Laws of Alaska for 1919.

Section 1. The office of Labor Commissioner of the Territory of Alaska is hereby created.

Section 2. The Mining Inspector of the Territory of Alaska shall be ex-officio Labor Commissioner, but shall receive no additional compensation for acting as such Labor Commissioner. The Mining Inspector is hereby empowered

and authorized to perform the duties, of such Labor Commissioner, as provided in this Act.

Section 3. The duties of the Labor Commissioner of the Territory of Alaska shall be:

(a) To assort, systematize and present in biennial report to the Governor of Alaska statistical details relating to all departments of labor in the Territory, especially in its relation to the industrial, social and sanitary conditions of the laboring classes, and to the permanent prosperity of the industries of the Territory.

(b) He shall have the power to enforce all sanitary and safety regulations, as are hereinafter set forth.

(c) He may inspect any factory, cannery or other establishment where labor is employed, and is hereby empowered and authorized so to do.

Section 4. In every factory, cannery or other establishment where labor is employed, all refuse, waste and sweepings shall be removed or disposed of at least once a day and in such a manner as not to become a nuisance. In every factory, cannery or other establishment in which any process is carried on which makes the floors wet, the floors shall be constructed and maintained with due regard to the health of employees, and grating or dry-standing rooms shall be provided if practicable, at points where employees are regularly stationed, and adequate means shall be provided for drainage and for preventing seepage or leakage to the floors below.

Section 5. In every factory, cannery, or other establishment where labor is employed, there shall be provided a sufficient supply of clean and pure drinking water; if such drinking water is placed in receptacles, such receptacles shall be properly covered to prevent contamination, and shall be thoroughly cleaned at frequent intervals. There shall be provided and maintained suitable and convenient washrooms, separate for each sex, adequately equipped with washing facilities, consisting of sinks or stationary basins provided with running water, or with tanks holding an adequate supply of

clean water. And there shall be provided in every factory, cannery or other establishment employing ten (10) or more persons, shower baths with a sufficient supply of hot and cold water. All wash-rooms, washing facilities and sleeping quarters (when furnished by employer), shall be constructed, lighted, heated, ventilated, arranged and maintained according to rules and regulations drawn up by the Labor Commissioner.

Section 6. Every factory, cannery or other establishment, where labor is employed, shall be provided with a sufficient number of water-closets, earth closets, or privies, within reasonable access of the persons employed therein, and such water-closets, earth closets or privies shall be supplied in the proportion of at least one (1) to every twenty-five (25) female persons, and one (1) to every thirty (30) male persons; and whenever both male and female persons are employed, said water-closets and privies shall be provided separate and apart for the use of each sex, and plainly marked by which sex they are to be used; and no person or persons shall be allowed to use the closets or privies assigned to the opposite sex; and such closets or privies shall be constructed in an approved manner and properly enclosed, and at all times kept in a clean and sanitary condition.

Section 7. In every factory, cannery or other establishment, when labor is employed, adequate measure shall be taken for securing and maintaining a reasonable, and as far as possible, equable temperature, consistent with the reasonable requirements of the manufacturing process.

Section 8. It shall be the duty of every employer of labor, his superintendent, manager, or agent, in this Territory to afford to the Labor Commissioner, every facility for the inspection of his factory, cannery or other establishment, where labor is employed, and for procuring statistics of the wages and conditions of his employees.

Section 9. Any person, firm or corporation, or any agent, manager, or superintendent of any person, firm or corporation, who shall, for himself or such person, firm or corpora-

tion, violate any of the provisions of this Act, or omits or fails to comply with any of the requirements of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished, for the first offense, by a fine of not less than twenty-five ($25) dollars, nor more than fifty ($50) dollars, or by 10 days' imprisonment in the Federal jail or by both such fine and imprisonment; and upon conviction of a second or subsequent offense he shall be fined not less than one hundred ($100) dollars, nor more than two hundred ($200) dollars, or by imprisonment for one (1) month in the Federal jail or by both such fine and imprisonment.

Section 10. An emergency is declared to exist and this Act shall go in effect and be in full force on and after June 1st, 1919.

APPENDIX E.

Tax Law of Alaska.

COMPILATION

of Chapter 31, Session Laws of Alaska, 1921, entitled

AN ACT

To establish a system of license taxation, to provide for the collection thereof and to provide punishment for doing business without a license, and declaring an emergency, as amended by Act of May 5, 1923 (Chapter 101, Session Laws of 1923).

Be it enacted by the Legislature of the Territory of Alaska:

"Section 1. Any person, firm, or corporation prosecuting or attempting to prosecute, any of the following lines of business, or who shall employ any of the following appliances, in the Territory of Alaska, shall apply for and obtain a license and pay for said license, for the respective lines of business and appliances, as follows:

As amended by Chapter 101, Session Laws 1923.

"1st: (*a*) Attorneys-at-law, chiropractors, and doctors, including persons practicing medicine, surgery or osteopathy, ten ($10.00) dollars per annum. Each member of a firm shall be liable for this tax.

"(*b*) Optometrists, fifteen ($15.00) dollars per annum.

"(*c*) Dentists, twenty-five ($25.00) dollars per annum. Each member of a firm shall be liable for this tax.

"(*d*) Undertakers Ten Dollars ($10.00) per annum.

"2nd: (*a*) Automobiles for pleasure or family use and delivery cars used for private delivery and not for hire, ten ($10.00) dollars per annum.

"(*b*) Automobiles for hire and trucks, fifteen ($15.00) dollars per annum; the treasurer of the Territory to furnish to each licensee a license metal tag, which shall be placed on each truck, car or automobile, by the owner, for which a license is issued, under such regulations as the treasurer shall make.

"3rd: Bakeries doing a business in excess of three thousand ($3,000) dollars and less than five thousand ($5,000.00) dollars shall pay a license of five ($5.00) dollars per annum, and those doing a business in excess of five thousand ($5,000.00) dollars shall pay an additional five ($5.00) dollars per annum for each five thousand ($5,000) dollars' worth of business, or fraction thereof, done annually.

"4th: Electric light and power plants, selling light, power or steam for heat and supplies to the public, one-half of one per cent of the gross receipts in excess of twenty-five hundred ($2,500.00) dollars per annum from light, power and steam sold; one-half of one per cent of the net profits from supplies sold; but this tax shall not apply to plants owned by municipalities.

"5th: Telephone companies, one-half of one per cent of gross receipts in excess of fifteen hundred ($1,500) dollars per annum; but this tax shall not apply to plants owned by municipalities.

"6th: Water-works selling water or power to the public,

one-half of one per cent of gross receipts in excess of twenty-five hundred ($2,500.00) dollars per annum; but this tax shall not apply to plants owned by municipalities.

"7th: Employment agencies, operating for hire and collecting a fee for services, five hundred ($500.00) dollars per annum.

"8th: FISHERIES:

"(*a*) Clam canneries, three (3) cents per case.

"(*b*) Salmon canneries; on kings, reds, sockeyes, ten (10) cents per case.

"(*c*) On a pack of kings, reds and sockeyes, counted together, at any one cannery, an additional tax shall be paid as follows: On all cases in excess of ten thousand (10,000) and not more than twenty-five thousand (25,000), five (5) cents per case; on all cases in excess of twenty-five thousand (25,000) and not more than forty thousand (40,000) ten (10) cents per case; on all cases in excess of forty thousand (40,000) and not more than fifty thousand (50,000) fifteen (15) cents per case; on all cases in excess of fifty thousand (50,000), twenty (20) cents per case.

"(*d*) On medium reds, cohoes, and pinks, four and one-half (4½) cents per case.

"(*e*) On a pack of medium reds, cohoes, and pinks, counted together, at any one cannery, an additional tax shall be paid as follows: On all cases in excess of twenty-five thousand (25,000) and not more than forty thousand (40,000), two (2) cents per case; on all cases in excess of forty thousand (40,000) and not more than fifty thousand (50,000), four (4) cents per case; on all cases in excess of fifty thousand (50,000), six (6) cents per case.

"(*f*) On chums, three (3) cents per case.

"In addition to the above tax, salmon canneries shall pay one per cent of their net annual income. The net income shall be determined in the same manner as the net income is determined under the Federal Income Tax Law, except that

no deduction shall be allowed on account of interest on bonds or money borrowed except on account of other territorial taxes paid.

"(*g*) SALTERIES: Fifteen (15) cents per one hundred pounds of mild-cured red king salmon; five (5) cents per one hundred pounds on mild-cured white king salmon; ten (10) cents per one hundred pounds on salted codfish; two and one-half (2½) cents per one hundred pounds on all other salted and mild-cured fish.

"(*h*) Fish traps, fixed or floating, two hundred ($200.00) dollars per annum, so-called dummy traps included; and an additional tax of two ($2.00) dollars per one thousand shall be paid on all fish caught in any one trap in excess of one hundred thousand (100,000).

"(*i*) Gill nets and stake nets, two ($2.00) dollars per one hundred fathoms, or fraction thereof.

"(*j*) Seines, ten ($10.00) dollars for the first one hundred fifty (150) fathoms, and five ($5.00) dollars additional for each twenty-five (25) additional fathoms or fraction thereof.

"(*k*) Fishermen who are not residents of the Territory, five ($5.00) dollars per annum. The term "fisherman" shall mean to include all persons employed on a boat engaged in fishing. This tax on non-resident fishermen shall continue only until January 1, 1924.

"9th: COLD STORAGE PLANTS:

"Doing a business of one hundred thousand ($100,000.00) dollars per annum or more, five hundred ($500.00) dollars per annum; doing a business of seventy-five thousand ($75,000.00) dollars per annum and less than one hundred thousand ($100,000.00) dollars, three hundred seventy-five ($375.00) dollars per annum; doing business of fifty thousand ($50,000.00) dollars and less than seventy-five thousand ($75,000.00) dollars per annum, two hundred fifty ($250.00) dollars per annum; doing business of twenty-five thousand ($25,000.00) dollars and less than fifty thousand

($50,000.00) dollars per annum, one hundred twenty-five ($125.00) dollars per annum; doing business of ten thousand ($10,000.00) dollars and less than twenty-five thousand ($25,000.00) dollars per annum, fifty ($50.00) dollars per annum; doing business of four thousand ($4,000.00) dollars per annum and less than ten thousand ($10,000.00) dollars per annum, twenty-five ($25.00) dollars; doing business under four thousand ($4,000.00) dollars per annum, ten ($10.00) dollars per annum.

"The 'annual business' under this subdivision shall be considered the gross amount received for the product and for storage of produce for others.

"10th: Fish buyers (dealers in fresh fish), one-tenth of one per cent per pound on fish purchased, except for sale at retail, whether or not the fish buyer operated a cold storage plant.

"11th: (*a*) Fish oil works and fertilizer plants, forty (40) cents per fifty (50) gallon barrel for oil and forty (40) cents per ton for fertilizers and fish meal.

"(*b*) Whale oil, fifty (50) cents per fifty (50) gallon barrel for oil, and fifty (50) cents per ton for fertilizer.

"12th: LAUNDRIES:

"Doing business of over two thousand ($2,000.00) dollars and less than five thousand ($5,000.00) dollars per annum, twenty-five ($25.00) dollars per annum; doing business of five thousand ($5,000.00) dollars or more and less than ten thousand ($10,000.00) dollars per annum, fifty ($50.00) dollars per annum; doing business of ten thousand ($10,000.00) dollars or more per annum, seventy-five ($75.00) dollars per annum.

"13th: MEAT MARKETS:

"Meat Markets doing a business of not less than ten thousand ($10,000.00) dollars nor more than twenty-five thousand ($25,000.00) dollars per annum, fifty ($50.00) dollars

per annum, doing business of not less than twenty-five thousand ($25,000.00) dollars nor more than fifty thousand ($50,000.00) dollars per annum, one hundred twenty-five ($125.00) dollars per annum; doing business of not less than fifty thousand ($50,000.00) dollars nor more than seventy-five thousand ($75,000.00) dollars per annum, two hundred fifty ($250.00) dollars per annum; doing business of not less than seventy-five thousand ($75,000.00) dollars nor more than one hundred thousand dollars ($100,000.00) per annum, three hundred seventy-five ($375.00) dollars per annum; doing business of more than one hundred thousand ($100,000.00) dollars per annum, five hundred ($500.00) dollars per annum; and fifty ($50.00) dollars additional for each twenty thousand ($20,000.00) dollars' worth of business done in excess of one hundred thousand ($100,000.00) dollars per annum; *Provided*, That the sum required to be paid for a license for prosecuting the business of a meat market under the provisions of Section 2569 of the Compiled Laws shall be deducted from the amount of tax due under the provisions of this subdivision.

"14th. Mercantile Establishments, other than exclusively wholesale mercantile establishments, doing business of more than one hundred thousand ($100,000.00) dollars per annum, fifty ($50.00) dollars per annum on each twenty thousand ($20,000.00) dollars' worth of business done in excess of one hundred thousand ($100,000.00) dollars.

"15th: MINING: One per cent on the net income in excess of ten thousand ($10,000) dollars and not in excess of five hundred thousand ($500,000) dollars, and on all net income in excess of five hundred thousand ($500,000) dollars and not in excess of one million ($1,000,000) dollars, one and one-half per cent (1½%); and on all net income in excess of one million ($1,000,000) dollars, one and three-fourths (1¾%) per cent.

"By 'net income' is meant the cash value of the output of the mine less operating expenses, repairs and betterments ac-

tually made, and royalties actually paid, and all taxes paid under Section 2569 of the Compiled Laws of Alaska; *Provided*, That the lessor of any mine operated under a lease shall be deemed to be engaged in mining within the provisions of this act and the royalties, less the cost of collecting the same, received by him, shall be deemed to be the net income within the provisions of this act; but where he receives royalties from more than one mining property he shall pay the tax on the aggregate income over five thousand dollars ($5,000.00). No deduction shall be made on account of depreciation of machinery, interest on bonds or money borrowed, or other taxes paid.

"By 'Mining' is meant any operation by which valuable metals, ores, minerals, asbestos, gypsum and marketable earth or stone is extracted from the earth.

"16th: Oil Wells: One cent per barrel in excess of five thousand (5,000) barrels from each well per annum.

"17th: Public Messengers: Twenty-five ($25.00) dollars per annum.

"18th: Ships and Shipping, Freight and Transportation: Ocean and coast-wide vessels doing business for hire and plying in Alaska waters, registered in Alaska and not registered elsewhere in the United States and not paying a tax or license elsewhere, and freight and passenger lines propelled by mechanical power, registered in the Territory of Alaska, and not paying a license or tax elsewhere in the United States, and river and lake steamers and barges, as well as transportation lines doing business wholly within the Territory of Alaska; one dollar per ton on net tonnage, custom house measurement of such vessel.

"19th: Dealers in non-alcoholic beverages, ten ($10.00) dollars per annum.

"20th: Manufacturing and repair shops, not otherwise listed as taxable, employing less than three men, exclusive of owner or proprietor, ten ($10.00) dollars per annum; employing three to ten men, twenty-five ($25.00) dollars

per annum; employing ten men or more, fifty ($50.00) dollars per annum.

"21st: Saw-mills (lumber mills and shingle mills), five (5) cents per thousand for shingles, and ten (10) cents per thousand feet, board measure, of lumber per annum."

Section 2. Every person, firm or corporation desiring to engage in any of the lines of business or employ the appliances specified in Section 1 shall first apply for and obtain from the Territorial Treasurer a license so to do. If the tax for the license applied for is a fixed one, the amount of such license tax shall accompany the application. If the amount of the tax is not a fixed sum, the applicant shall state in his application that he agrees to pay the license tax and will make a true return and will pay to the Treasurer such tax on or before the fifteenth of the next ensuing January.

The applicant shall also state the name of the person, firm or corporation making the application; the line of business to be licensed and the place where said business will be carried on. Upon the receipt of the application in proper form, the Treasurer shall issue the license as of the date of the application, and the applicant may carry on the business from and after the date the application was actually made.

Section 3. All license taxes, except those where the tax is a fixed one, shall be due and payable on December 31st of each year and must be paid on or before January 15th following; *Provided,* That the Treasurer shall have the power to extend such time until the fifteenth of the next ensuing March upon the special showing made by the licensee that such extension is necessary in order to enable him to ascertain the amount of taxes due, and it shall be the duty of the person, firm or corporation engaged in any of said lines of business to make a return under oath to the Treasurer on or before January fifteenth of each year, or, in case of an extension as above provided, on or before March fifteenth, setting forth the name of the licensee, the number of the license, and all the facts regarding the business necessary

to enable the Treasurer to determine the amount of the tax to be paid, and all applications for renewals of such licenses shall be made on or before January fifteenth of the calendar year for which such renewal is made.

In the event the tax is not paid before delinquency, as provided for by this section, a penalty of ten per centum of such tax shall be added, and such tax with such penalty shall draw interest at the rate of twelve per centum per annum until paid; *Provided,* That any person, firm or corporation engaged in or about to engage in mining, may designate in his application for a license the last day of any month in the year as the day of the closing of his fiscal year, and shall be entitled to have the tax payable by such person, firm or corporation computed upon the basis of the net income ascertained as herein provided for the full year ending on the day so designated in the year preceding the date when the tax is due, instead of upon the basis of the net income of the calendar year preceding the date when the tax is due.

Section 4. Any person, co-partnership or corporation, who shall prosecute or attempt to prosecute any of the businesses above enumerated, or shall employ any of the appliances above enumerated, without first having a license so to do issued under this Act, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not to exceed one thousand dollars ($1,000) or by imprisonment in the jail not to exceed three months, or by both such fine and imprisonment; provided, however, that any such person, co-partnership or corporation who shall have for the year 1921 procured a license for any business or appliance under and pursuant to the provisions of Chapter 33 of the Laws of 1919, whereon a fixed tax is payable at the time the application for the license is made, shall not be required to take out or procure another license for the same business or appliance under this Act until after such license, issued under the Act of 1919, has expired. And provided, further, that

each month or fraction of month in which the business is prosecuted or appliance is used in violation of this Act shall be deemed a separate offense.

Section 5. Every licensee or other person prosecuting or attempting to prosecute a business upon which the amount of the license tax under this Act is based on the amount of the business transacted or on the profit of such business, shall keep in permanent form at his, their or its principal place of business, within the Territory, correct accounts of the business transactions in such a manner as to readily disclose, upon examination of such accounts, the amount of the tax due the Territory. The Auditor, if such officer shall function, otherwise the Treasurer, shall have authority to promulgate rules and regulations for the making and keeping of such records, and when such rules and regulations are so promulgated they shall be followed by the licensees. The records herein provided for, as well as the premises where the business is prosecuted, shall be open at all reasonable times to the inspection by the Treasurer of the Territory, or by anyone whom the Treasurer shall in writing delegate for that person [purpose], or by the Attorney General, or anyone whom he shall in writing delegate for that purpose; provided, however, that no information acquired by any such officials or their representatives in the examination of the records of any such person, co-partnership or corporation, shall be used or competent for use except in proceedings to prosecute offenses under this Act, or in proceedings to collect the tax under this Act; and it shall be unlawful to disclose such information, so acquired, except for the purpose above stated.

Section 6. In event any licensee shall fail or refuse to make and keep such accounts as provided for in the foregoing section, or shall refuse to permit such books, records and accounts or premises to be so inspected, as above provided for, the Auditor of the Territory, if such officer functions, otherwise the Treasurer of the Territory, shall estimate

the amount of the tax due from such information as he may have or such facts as may come to his knowledge; and such estimate, arrived at by the Auditor or Treasurer, shall be accepted and treated as conclusively correct, and the licensee shall be liable for such amount as the tax under this Act: provided, however, that in the appropriate proceedings, the District Court shall have authority and it shall be its duty by the proper order to direct the licensee or such other persons as prosecute the business upon which the tax is levied by this Act, to exhibit to the said officials above mentioned, or their representatives, the books of account, vouchers and other records kept by such licensee or other person above referred to, and enforce such order in the usual manner.

Section 7. Any person, co-partnership or corporation violating any of the provisions of this Act shall be deemed guilty of a misdemeanor; and upon conviction thereof shall be punished by a fine or imprisonment, as above provided; and prosecutions for violations of any of the provisions of this Act may be by information filed by the Attorney General or other authorized legal counsel for the Territory, in any court of competent jurisdiction. Where the prosecution is had for failure of a licensee or other person to remit accrued tax, based upon the amount of business transacted or profit made, the fine imposed shall not be less than the amount of the tax, with the penalty and interest, as well as the costs of the prosecution, and such judgment shall be a prior, paramount and superior lien on all of the defendant's property in the Territory; *Provided, however,* That in any prosecution under the terms of this act, no person otherwise competent as a witness, shall be privileged from testifying on the ground that his testimony may incriminate him, and no officer or agent of any corporation shall be privileged from testifying on the ground that his testimony may incriminate such corporation; but no indictment or prosecution shall afterwards be brought against such witness on account of any offense or transaction concerning which

he testified as a witness, nor shall any indictment or prosecution be afterwards brought against any corporation on account of any offense or transaction concerning which any officer or agent of such corporation is compelled to testify as a witness; *Provided, further,* That in any prosecution hereunder, the Attorney General, or other authorized legal counsel of the Territory, may, with the consent of the Governor, compromise the case by accepting from the defendant a sum not less than the tax, legal interest thereon, and all costs and expenses.

Section 8. It shall be the duty of the Attorney General or other authorized legal counsel of the Territory to enforce the provisions of this Act, and for that purpose he may, with the approval of the Governor, employ such assistants as he may deem necessary, but the compensation for services of such assistants shall be paid out of the fund recovered, and the Territory shall not be liable therefor in any event beyond fifteen (15) per cent of the amount so recovered in each case; assistant counsel may, however, be employed at a previously agreed upon and stipulated fixed fee.

Section 9. Special remedies provided by this act, or other acts of the Legislature, shall not be deemed exclusive, and any appropriate remedy, either civil or criminal, or both, may be invoked by the Territory in the collection of all taxes, and enforcement of the tax lien.

Section 10. All taxes levied, laid or provided in this Act, and the penalties and interest accrued, are hereby declared to be a lien, prior, paramount and superior to all other liens, mortgages, hypothecations, conveyances and assignments, upon all the real and personal property of the person, firm or corporation liable therefor, and also upon all the real and personal property used with the permission of the owner thereof in prosecuting the various industries or lines of business upon which a license tax is levied by this Act.

As amended by Chapter 101, Session Laws 1923.

Section 11. It shall be the duty of the United States marshals and deputy marshals in the Territory of Alaska to enforce the provisions of this Act in their respective precincts, districts or divisions, and to report all violations thereof to the Governor, and under his direction file information, or take such proceedings as he may direct; and for the services so performed they shall be paid under the provisions of Section 3 hereof. And, for all negligence or willful failure to perform such duties, marshals and deputy marshals shall be liable to the Territory for all losses sustained, which liabilities may be enforced in any appropriate proceeding.

Section 12. The Auditor, if such officer functions, otherwise the Treasurer, of the Territory is authorized and directed to prescribe suitable forms of applications, licenses, returns and other such forms as may be necessary or proper to carry this law into effect. He shall distribute such forms to the public through the clerks of the court or marshal's office in the several divisions for the use of those subject to the taxes herein laid.

Section 13. Chapter 33 of the Session Laws of 1919 is hereby repealed, but nothing herein contained shall be construed to relieve any person, firm or corporation from the payment of any tax, penalty and interest accrued and owing under the provisions of any of the acts hereby repealed; but all such taxes, penalties and interest shall be paid, collected and enforced in the same manner as taxes herein provided for are collected and enforced.

Section 14. Except as otherwise provided in this Act, all licenses shall be issued for the calendar year, beginning on January 1st and ending on December 31st of each year, and where the tax is not a fixed sum, but is computed after the close of the year's business, it shall be computed on the basis of the business done during such calendar year, and all taxes for the current year shall be calculated upon the basis of the schedule adopted by this Act.

Section 15. An emergency is hereby declared to exist, and this Act shall take effect from and after its passage and approval.

Approved May 5, 1921.
Amendment approved May 5, 1923.

(8132)